86-375

No.

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD P. HODEL, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

QUESTIONS PRESENTED

WHETHER the Court of Appeals erred in interpreting the McCarran Amendment, 43 U.S.C. 666—which is a most constricted waiver of sovereign immunity involving the adjudication of rights to the use of water of a river system or other source—as divesting the United States District Court of jurisdiction over this action initiated by Petitioner Tribe and declaring that jurisdiction resides in the Arizona State Court General Adjudication Water Rights Proceedings to hear and to adjudge Petitioner Tribe's charges that Respondent Donald P. Hodel and subordinates of that official, as individuals, are fraudulently, intentionally, and illegally violating Petitioner Tribe's reserved Salt River rights for the benefit of the Secretarial Salt River Federal Reclamation Project?

WHETHER the Court of Appeals erred in affirming the District Court's Rule 54(b) Order severing that phase of Petitioner Tribe's claims respecting the intentional, fraudulent, and illegal violation of Petitioner Tribe's reserved Salt River rights and summarily dismissing that phase of Petitioner Tribe's claim against Respondent Secretary Hodel and subordinates on the grounds that the Arizona State Court, not the United States District Court, had jurisdiction of Petitioner Tribe's controversy with Respondent Hodel and subordinates respecting its reserved Salt River rights?

WHETHER the Court of Appeals erred in totally recasting Petitioner Tribe's complaint by declaring that Petitioner Tribe was proceeding against the United States, irrespective of the explicit pleadings in the complaint that Petitioner Tribe's action was against Respondent Hodel and subordinates *as individuals* acting illegally, intentionally, fraudulently, and beyond the scope of their authority—not as officials of the United States —in violating Petitioner Tribe's reserved Salt River rights?

WHETHER this action should be remanded to the District Court for final resolution while the State Court W-1 Proceedings are in their infancy rather than adopting the course required by the United States Court of Appeals which would enmesh the highly controversial charges of fraud and illegality

directed against Respondents, in the State Court W-1 Proceedings which, it is conservatively estimated, will consume a minimum of a half century to complete during which time the festering issue presented here may well remain unresolved and a constant threat to the full resolution of the controversies among the tens of thousands of water rights claimants in the State Court W-1 consolidated cases?

* * * *

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed [substituted parties]:

> Donald P. Hodel, Secretary; James H. Stevens, Area Director, Bureau of Indian Affairs; Henry Dodge, Area Land Operations Officer; Russell Bradley, Superintendent of the Bureau of Indian Affairs, Fort Apache Indian Reservation; Morris Williams, Forester; Kenneth Butler, Forester; Michael Smith, Agency Land Operations Officer, and the incumbent personnel of the Bureau of Indian Affairs.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Article VI.

> This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment [V.], Rights of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1362. Indian Tribes.

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Emphasis supplied).

Declaratory Judgments Act

28 U.S.C. 2201. Creation of remedy.

> In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

43 U.S.C. 666

> Suits for adjudication of water rights—Joinder of United States as defendant; costs
>
> (a) Consent is given to join the United States as a defendant any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation

under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

Service of Summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Joinder in suits involving use of interstate streams by State.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, 208 (a)-(c), 66 Stat. 560.

5 U.S.C. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee hereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The

United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States; Provided, That any mandatory or injunctive decree shall specify the Federal offier or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statue that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED	
Constitution of the United States, Article I, Sec. 8, Clause 3	ii
Constitution of the United States, Article VI	ii
Constitution of the United States, Amendments [V.]	iii
28 U.S.C. 1362—Indian Tribes	iii
28 U.S.C. 2201—Creation of remedy	iii
43 U.S.C. 666—McCarran Amendment	iii
5 U.S.C. 702—Right of review	iv
5 U.S.C. 706—Scope of review	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
Parties	2
Jurisdiction	2
Petitioner Tribe Charges Respondent Secretary Hodel and Subordinates with Fraudulent Mismangement of its Reservation	3
A. Fraud is Wallmark of Secretarial Management Tribe's Reservation	5
B. A Critical Element of Secretarial Fraud—Destruction of Petitioner Tribe's Forest and Grazing Land To Enhance Salt River Flow	5
C. Artificially Enhanced Salt River Runoff a Consequence of Secretarial Fraud	7
D. Petitioner Tribe Entitled to Injunctive Relief Against Fraudulent Conduct of Respondent Secretary—Damages Totally Inadequate	8

Page

Allegation in Petitioner Tribe's Complaint To Be Taken as True 8

Petitioner Tribe's Action Is To Restrain Fraudulent and Illegal Conduct by Respondent Hodel and Subordinates 9

Petitioner Tribe's Reserved Salt River Rights Are Interests in Real Property of the Highest Dignity. 10

Respondent Hodel and Subordinates Without Power or Authority To Seize Petitioner Tribe's Reserved Rights 10

Consummation of Secretarial Fraud in State Court W-1 Proceedings 12

State Court W-1 Proceedings 12

Petitioner Tribe's Unvarying Resistance to the Water Rights Claim Filed in the State Court W-1 Proceedings 12

ARGUMENT 14

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI 14

COURT OF APPEALS' ERRONEOUS OPINION DEPARTS FROM ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND ADVERSELY IMPACTS FEDERAL-STATE-TRIBAL JURISDICTION 14

The Companion Case 14

Appellate Court Departs Sharply from the Court's Opinions 14

The Court of Appeals Departs Radically from Its Own Decisions 18

Language of and the Interpretations Placed upon the McCarran Amendment, 43 U.S.C. 666 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASE	Page
Arizona v. California, 376 U.S. 340 (1964)	3, 4
Arizona v. San Carlos, 463 U.S. 545, 569 (1983)	9a, 10a, 11a
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936)	10
Colorado Conservation District v. United States, 424 U.S. 800, 808 (1976)	20
Curtis v. Everette, 489 F.2d 516, 518 (CA 3, 1976) *cert.den.* 1973	9
Dugan v. Rank, 372 U.S. 609, 618 (1963)	16, 20, 5c
Garrett v. Bamford, 538 F.2d 63, 65 (CA 3, 1976); *cert.den.* 429 U.S. 977 (1976)	9
Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898)	10
Ickes v. Fox, 300 U.S. 82, 96 (1937)	
Johnsrud v. Carter, 620 F.2d 29, 32 (CA 3, 1980)	9
Land v. Dollar, 330 U.S. 731, 738 (1947)	16
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 (1949)	
Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1946)	10
Philadelphia v. Stimson, 223 U.S. 605 (1912)	10
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)	22
Scheuer v. Rhodes, 416 U.S. 232 (1974)	8
Seminole Nation v. United States, 316 U.S. 266, 297 (1942)	
Shoshone Tribe v. United States, 299 U.S. 476, 497, 498 (1937)	4, 11, 12
Smith v. Curtis, 416 U.S. 995	9
Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910)	10
Turner v. Kings River Conservation District, 360 F.2d 184, 189 (1916)	
United States v. Chandler Dunbar Co., 229 U.S. 53, 73, (1913)	10
United States v. Creek Nation, 295 U.S. 103 (1935)	
United States v. Lee, 106 U.S. 196 (1882)	
United States v. Sherwood, 312 U.S. 584 (1940)	

	Page
United States v. White Mountain Apache Tribe, 784 F.2d 719 (CA 9, 1986)	22
Washington v. Udall, 417 F.2d 1310, 1318, 1320 (CA 9, 1959)	18
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 138 (1980)	15
White Mountain Apache Tribe v. Secretary Clark [*Hodel*], 604 F.Supp. 185 (U.S.D.C.D. Ariz.)	1, 8, 5c
White Mountain Apache Tribe v. Secretary Clark [*Hodel*], 784 F.2d 921 (CA 9, 1986)	1, 14, 19
White Mountain Apache Tribe v. Shelley, 107 Ariz. 4; 480 Pac.2d 654 (1971)	21
Winters v. United States, 207 U.S. 564 (1908)	3, 4
Wright v. Best, 19 Cal.2d 368; 121 Pac.2d 702 (1942)	10
STATUTES	
25 U.S.C. 476	
15 U.S.C. 1362	iii
28 U.S.C. 1254(1)	
43 U.S.C. 666 (McCarran Amendment)	iii
28 U.S.C. 2201	iii
30 Stat. 62, 64	4
82 Stat. 885	6
MISCELLANEOUS	
Rule 17, Supreme Court Rules, "Jurisdiction on Writ or Certiorari"	14
Bogert, *The Law of Trusts And Trustees,* Rev. 2d ed. 1978, § 543, p. 187, "Trustee's Duty Of Loyalty To Beneficiaries"	11
Vol. 2. Scott, *Law Of Trusts,* "Duties Of the Trustee," § 169, p. 1297	11
Vol. 1, *Restatement Of The Law Of Trusts Second,* § 170, "Duty of Loyalty"	11
1 Story, Equity Jurisprudence, Sec. 187	5
Vol. 2A, *Moore's Federal Practice 1983-84,* Commulative Supplement, Sec. 1208, p. 2266	9
5 *Federal Practice and Procedure,* Wright, Miller & Kane, 1350, pp. 551-52	9
Wiel, *Water Rights in the Western States,* 3rd. Ed., Vol. 1, Sec. 18, pp. 20, 21; Sec. 283 pp. 298-300; Sec. 285, p. 301	10

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner White Mountain Apache Tribe respectfully prays the Court that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit which was rendered on March 7, 1986, and a timely petition for rehearing *en banc* having been denied by the Court of Appeals on June 3, 1986.

OPINIONS BELOW

The United States District Court for the District of Arizona entered its original order dismissing Petitioner Tribe's complaint on October 12, 1984.[1] That order is Appendix A of this Petition. Subsequently, the District Court, at Petitioner Tribe's request, reconsidered its October 12, 1984 order and entered its February 15, 1985, Rule 54(b) Order,[2] Appendix B of this motion. Petitioner White Mountain Apache Tribe appealed the Rule 54(b) order to the United States Court of Appeals for the Ninth Circuit. That Court of Appeals rendered its opinion on March 7, 1986.[3] That opinion is Appendix C of this Petition. On June 3, 1986, the Court of Appeals entered its order denying the petition for rehearing *en banc*. That Order is Appendix D of this Petition.[4]

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered March 7, 1986.[5] The Order denying petition for rehearing *en banc* was entered June 3,

---

[1] Appendix A, *White Mountain Apache Tribe v. Secretary Clark* [Hodel], *et al.*, 604 F.Supp. 185 (U.S.D.C.D. Ariz. 1984).

[2] Appendix B, Order, October 12, 1984.

[3] Appendix C, *White Mountain Apache Tribe v. Secretary Hodel, et al.*, 784 F.2d 921 (CA 9, 1986).

[4] Appendix D, Order dated June 3, 1986.

[5] Appendix C.

1986 [6] and the 90-day period for filing a petition for a Writ of Certiorari will expire September 2, 1986. Petitioner Tribe's motion filed August 27, 1986 for an extension of time in which to file this petition for a Writ of Certiorari was denied August 29, 1986.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, is a duly organized Indian Tribe recognized by the Secretary of the Interior in accordance with 25 U.S.C. Sec. 476.[7] Petitioner Tribe, on October 20, 1983, filed its complaint for Declaratory Judgment and for Permanent Injunction, not monetary damages, against James G. Watt, then Secretary of the United States Department of the Interior; the present incumbent is Secretary Donald P. Hodel. The action was initiated in the United States District Court for the District of Arizona, Civ. 83-2045.

Jurisdiction of District Court: Pursuant to 28 U.S.C. 1362, Congress provides that an Indian Tribe in the status of Petitioner, may initiate civil actions of the nature here involved arising "... under the Constitution, laws, or treaties of the United States." There is a genuine, onoging, irreconcilable conflict between Petitioner White Mountain Apache Tribe and Respondent Donald P. Hodel, Secretary of the Department of the Interior, which conflict comes within the purview of 28 U.S.C. 2201, *et seq.,* the Declaratory Judgment Act. Pursuant to 28 U.S.C. 1362, Petitioner Tribe may implement the declaratory judgment relief which it seeks by an appropriate injunction order for which it has prayed.

---

[6] Appendix D.

[7] *See* Appendix E to this Petition, Complaint, Location Map following p. 1.

By this action, Petitioner Tribe seeks its day in Court to establish the fact that successive Secretaries of the Interior, subordinates of those officials, Respondent Hodel and subordinates of that official, have in the past and are now illegally and fraudulently violating and threatening to continue to violate Petitioner Tribe's Constitutional, civil, and vested property rights, which are protected by the Due Process provisions of the Constitution.

Petitioner Tribe Charges Respondent Secretary Hodel and Subordinates, With Fraudulent Mismanagement of Its Reservation: Petitioner White Mountain Apache Tribe, in its Complaint,[8] reviews the corrupt history of the Department of the Interior in the mismanagement of its Reservation, which was created by Executive Orders dated November 9, 1871 and December 14, 1872.[9] Inherent in those Executive Orders is the controversy giving rise to this Petition. Those Executive Orders establish the Northern Boundary of the then White Mountain Apache Indian Reservation as being . . . the South Edge of the Black Mesa," which constitutes the watershed divide between the Salt River drainage and the drainage of the Little Colorado.[10] Stressed in that Complaint is the fact concerning that the Salt River, which arises within the Fort Apache Indian Reservation is the lifeline of Petitioner Tribe for, as the Court has recognized, water in the arid West is an imperative necessity if the Indians are to survive on their Reservations.[11] It is a controlling fact, respecting Petitioner Tribe's action against Respondent Hodel and subordinates of that official, that the Salt River and numerous tributaries of that stream rise within the Fort Apache Indian Reservation and constitute the sole source of water now and in the future for Petitioner White Mountain Apache Tribe. The Secretary of the Interior re-

---

[8] Appendix E, Complaint, pp. 4, *et seq.*

[9] Appendix E, Executive Orders are Appendix A to Complaint, pp. 1-5.

[10] *See, Supra.*, ftn. 7, Location Map; Appendix E, Complaint, p. 8, para. XVII, Plates I and II, locating the South Edge of the Black Mesa, headwaters of Salt River.

[11] *Arizona v. California,* 373 U.S. 564, 599-601 (1963), citing *Winters v. United States,* 207 U.S. 546 (1908).

quested and there was established in 1897 the [12] the Fort Apache Indian Reservation which, as can be seen from the Location Map set forth in Petitioner Tribe's Complaint, is a hydrological unit encompassing the Upper Drainage of the Salt River.

Gravamen of Petitioner Tribe's Complaint against Respondent Secretary is that the Fort Apache Indian Reservation was severed from the White Mountain Apache Indian Reservation solely for the purpose of providing a water supply from the Salt River for the non-Indian water users in the Salt River Valley. Confirming that contention of Petitioner Tribe is the fact that immediately following the severance of the Upper Drainage of the Salt River encompassed by the Fort Apache Indian Reservation, on March 14, 1903, the Secretary of the Interior, authorized the construction of the Salt River Federal Reclamation Project.[13] Thereafter—*totally without authority*—in clear violation of Petitioner Tribe's reserved rights to the use of water in the Salt River and its tributaries [14] and in clear violation of the obligations of the United States of America Trustee for Petitioner Tribe,[15] the Secretary of the Interior: (1) claimed *all* of the waters of the Salt River for the benefit of the Salt River Federal Reclamation Project to the total exclusion of Petitioner Tribe;[16] (2) planned, designed, constructed; and (3) now operates the Salt River Federal Reclamation Project utilizing all of the surface, flood flow, and all of the water that the Secretary can artificially induce to flow away from the Fort Apache Indian Reservation for the use and benefit of the non-Indian water users in the Salt River Federal Reclamation Project.[17]

---

[12] 30 Stat. 62, Act June 7, 1897. "Be it enacted, * * * That a separate agency is hereby created to cover and have jurisdiction over all that portion of the White Mountain or San Carlos Reservation lying north of the Salt or Black River, to be known as the Fort Apache Reservation, with headquarters at Fort Apache, Arizona: * * *"

[13] Appendix E, Complaint, Location Map following p. 1.

[14] *Supra. ftn. 11, Arizona v. California; Winters v. United States.*

[15] *Shoshone Tribe v. United States,* 299 U.S. 476, 497 (1937); Seminole Nation v

[16] Appendix E, Complaint, p, 23, para. XLVII, *et seq.*

[17] *Ibid.*, at p. 34, para. LXVIII, "Induced Aridity—Secretarial Scorched Earth Policy," *et seq.*

A. Fraud is Hallmark of Secretarial Mismanagement of Petitioner Tribe's Reservation:

Justice Story has defined fraud, in the sense the term is used here, as acts and concealments which involve a breach of trust justly reposed or by taking an undue and unconscionable advantage.[18] From time immemorial Petitioner Tribe has utilized the waters of the Salt River and its tributaries that arise on the Fort Apache Indian Reservation, which Reservation, as stated above, was intentionally severed from the White Mountain Apache Indian Reservation in 1897 by the Secretary of the Interior solely for the purpose of providing a firm supply of water to the non-Indian water users in the Salt River Valley.[19] At no time was Petitioner Tribe informed that the Secretary of the Interior has illegally committed—wholly without authority—[20] *all* of the waters of the Salt River for the benefit of the Salt River Federal Reclamation Project to the exclusion of Petitioner Tribe.

In 1913, Congress investigated the corruption in the Department of the Interior involving the Salt River Federal Reclamation Project and declared, among other things, that: "The Indian interests have been most outrageously intermingled with the affairs of the Reclamation Service. . ." Transations in which the Department of the Interior engaged in connection with the Project have, said Congress: ". . .many of the badges of fraud." [21]

Throughout the scandalous history of the Salt River Federal Reclamation Project, successive Secretaries of the Interior, including the incumbent Respondent Secretary Hodel, have operated that project in clear violation of Indian reserved rights including those of Petitioner Tribe. Incumbent Respondent Secretary Hodel has announced the enlargement of Roosevelt Dam, the principal component of the Salt River Federal

---

[18] 1 Story, *Equity Jurisprudence*, Sec. 187.

[19] Appendix E, Complaint, p. 22, para. XLVI, "Secretarial Mismanagement of . . . Fort Apache Indian Reservation for the Benefit of Reclamation Projects . . ."

[20] Appendix E, p. 30, para. LX, *et seq.*

[21] Appendix E, Complaint, p. 23, para. XLVIII.

Reclamation Project better to manage the waters of the Salt River for the benefit of the non-Indian Project in total disregard of the Petitioner Tribe's reserved rights in that river.[22]

In furtherance of the Salt River Federal Reclamation Project, the successive Secretaries of the Interior, including incumbent Respondent Hodel, have—to the irreparable damage of Petitioner Tribe—systematically suppressed irrigation and other water use development upon Petitioner Tribe's Reservation to the end that all the waters within the Reservation flow away from the Reservation for the benefit of the Salt River Project. The bureau of Indian Affairs, an agency administered by the Secretary of the Interior, manages Petitioner Tribe's Reservation on the basis that "every drop of" Salt River water on the Reservation is committed to the Salt River Federal Reclamation Project.[23]

B. *A Critical Element of Secretarial Fraud—Destruction of Petitioner Tribe's Forests and Grazing Land To Enhance Salt River Flow:* A critical element in Petitioner Tribe's Complaint has been the "Fraudulent Facade" behind which successive Secretaries of the Interior, including the incumbent, have consistently manipulated Petitioner Tribe's Reservation and in so doing have engaged in "... fraud, sham, bad faith and ... scandalous conduct." [24]

Ongoing destruction by Respondent Hodel of Petitioner Tribe's forests to enhance Salt River flow away from Petitioner Tribe's Reservation exemplifies the invidious character of the fraud being practiced upon Petitioner Tribe. Large areas of Petitioner Tribe's invaluable forests have been clearcut with the objective of obtaining greater runoff away from the Reservation.[25] In addition to the destruction of Petitioner Tribe's forests, there has been an intentional mismanagement by the Secretary of the Interior of Petitioner Tribe's grazing lands. As a consequence of the enhanced runoff and the destruction of

---

[22] 82 Stat. 885, United States Department of the Interior Budget Justification F.Y. 1987.

[23] Appendix E, Complaint, p. 30, para. LX.

[24] *Ibid.*, at p. 46, para. XCVI.

[25] *Ibid.*, at p. 37, para. LXXVIII, "Mismanagement of Forests To Increase Runoff."

Plaintiff Tribe's once-fine grazing lands by the Secretary of the Interior, soil erosion is rampant throughout the Reservation giving rise to accelerated runoff which produces sheet and gully erosion and has destroyed thousands of irrigable acres of land on the Reservation.[26]

C. *Artificially Enhanced Salt River Runoff a Consequence of Secretarial Fraud:* Irreparable and continuing damage through Secretarial intentional mismanagement of Petitioner Tribe's Reservation has far reaching and destructive implication for Petitioner Tribe. Not only did the Secretary of the Interior claim and utilize *all* of the waters arising upon the Fort Apache Indian Reservation for the benefit of the Salt River Federal Reclamation Project, successive Secretaries of the Interior including Respondent Hodel, have at great cost, manipulated forest growth and vegetative cover with the objective of artificially enhancing Salt River stream flow away from the Reservation. Short-term results of that destruction of trees and native grass was an artificially enhanced flow of Salt River water away from the Reservation and down to the Secretarial Slat River Federal Reclamation Project of Upwards to 100,000 additional acre feet of water annually.[27] Long term consequences of that destruction of Petitioner Tribe's forest and vegative cover gave rise to an intrusion of noxious weeds and a proliferation of pinyon juniper throughout the entire Reservation destroying thousands of acres of once fine grazing lands. As a consequence of the growth of pinyon juniper and noxious plant life, there was a depletion of the natural flow away from the Reservation. The pinyon juniper infestation not only deprived Petitioner Tribe of invaluable grazing lands, the pinyon juniper consumed huge quantities of water to which Petitioner Tribe is entitled. Contemporaneously with the proliferation of juniper growth throughout the Reservation, Agents of the Secretary of the Interior, to enhance stream flow for the Salt River Project, destroyed, by poison and otherwise, the trees and other growth along the banks of the streams, resulting in a severe downgrading of the beds of the stream and

---

[26] *Ibid.*, at p. 19, para. XXXVIII, "Catastrophic Erosion Throughout the Reservation."

[27] *Ibid.* Appendix E, Complaint, p. 45, para. XCIV.

erosion of large areas of bottom land, much of which involved destruction of Plaintiff Tribe's irrigated land.

D. *Petitioner Tribe Entitled to Injunctive Relief Against Fraudulent Conduct of Respondent Secretary—Damages Totally Inadequate:* Petitioner Tribe seeks injunctive relief to prohibit further destruction of its Fort Apache Indian Reservation by Respondent Secretary of the Interior and his subordinates for the benefit of the Salt River Federal Reclamation Project and now the Central Arizona Federal Reclamation Project. As subsequently reviewed, the District Court and the Court of Appeals were in grave error when they purport to relegate Petitioner Tribe to money damages.

ALLEGATION IN PETITIONER TRIBE'S COMPLAINT TO BE TAKEN AS TRUE

By summarily dismissing Petitioner Tribe's complaint, the District Court committed plain, serious, and reversible error.[28] It is elemental that, when considering a motion to dismiss, the allegations of illegal and fraudulent conduct by successive Secretaries of the Interior and their subordinates are to be taken true.[29] There the Court declared that where, as here, a complaint is summarily dismissed by the District Court, the facts alleged in the complaint must be taken as true. *Scheuer v. Rhodes* is, moreover, precedent for the proposition that a complaint must be construed favorably to the pleader and that upon a motion to dismiss the task of the District Court is "necessarily a limited one."

> The issue [for the court to decide on a motion to dismiss] is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Continuing the Court, quoting from *Conley v. Gibson,* declared:

> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint

---

[28] Appendix A, *White Mountain Apache Tribe v. Hodel,* 604 S.Supp. 185, 186, 190, (U.S.D.C.D. Ariz. 1984).

[29] *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1978).

> should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' [30]

On repeated occasions, those concepts have been applied, it having been stated as a governing precept of the law that "... the well-pleaded allegations of the complaint are taken as admitted..." [31] Moreover, "summary disposition" is disfavored.[32]

PETITIONER TRIBE'S ACTION IS TO RESTRAIN FRAUDULENT AND ILLEGAL CONDUCT BY RESPONDENT HODEL AND SUBORDINATES

There has been pleaded above the grave misconduct and successive Secretaries of the Interior, their subordinates, Respondent Hodel and his subordinates who have intentionally mismanaged Petitioner Tribe's Fort Apache Indian Reservation; have destroyed Petitioner Tribe's grazing lands; have destroyed large areas of Petitioner Tribe's forest lands; and have claimed *all* of the waters of the Salt River and its tributaries for the benefit of the Secretarial Salt River Federal Reclamation Project. Those charges are made against Respondent Hodel and subordinates, not against the United States of America. The charges are against the named officials as individuals who are destroying Plaintiff Tribe's Reservation by arbitrary, capricious, and fraudulent acts beyond the scope of their authority.

---

[30] *Ibid.*, at p. 238.

[31] Vol. 2A, *Moore's Federal Practice,* 1983-84 Cumulative Supplement, Sec. 1208, p. 2266 and cited authorities. In addition, *see* also *Garrett v. Bamford,* 538 F.2d 63, 65 (CA 3,1976), *cert. den.,* 429 U.S. 977 (1976), citing *Walker, Inc. v. Food Machinery,* 381 U.S. 1972, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); *Curtis v. Everette,* 489 F.2d 516, 518 (3d Cir. 1973), cert. den. sub. nom.; *Smith v. Curtis,* 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974), 5 *Federal Practice and Procedure,* Wright, Miller & Kane, 1350, pp. 551-52, and cited authorities.

[32] *Johnsrud v. Carter,* 620 F.2d 29, 32 (CA 3,1980).

Petitioner Tribe's Reserved Salt River Rights Are Interests in Real Property of the Highest Dignity.[33] It is elemental that Petitioner Tribe's reserved rights in the Salt River are part and parcel of the lands which comprise the Fort Apache Indian Reservation.[34] To preserve and to protect those reserved rights to the use of water in the Salt River, Petitioner Tribe is fully within its rights to initiate an action to have resolved the conflict with the Secretary of the Interior, who, as Petitioner Tribe has repeatedly declared, is acting illegally. This Court, in *Ickes v. Fox,* declared that where, as here, the Secretary of the Interior is violating vested rights, the District Court has jurisdiction to resolve the controversy.[35] The rationale of *Ickes v. Fox* is particularly relevant here. In that case, the Court declared that the action initiated to preserve and protect vested rights was not against the United States where the Secretary of the Interior, as here, is acting beyond the scope of his authority and in so doing is violating vested property rights. As will be reviewed, the Court of Appeals was in grave error when it totally recast, restructured, and, in effect, rewrote the complaint filed by Petitioner Tribe declaring that the action was against the United States of America, while simultaneously denying Petitioner Tribe's right to prove in open Court to the contrary.[36]

On repeated occasions, the right to a property owner to be heard by resorting to "equity for protection" against unauthorized actions of an officer of the United States is too clear for serious doubt.[37]

Respondent Hodel and Subordinates Without Power or Authority To Seize Petitioner Tribe's Reserved Rights: An exhaustive investigation has been made to ascertain the source

---

[33] *Wiel, Water Rights in the Western States,* 3d ed., Vol. 1, Sec. 18, pp. 20, 21; Sec. 283, pp. 298-300; Sec. 285, p. 301; *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 73 (1913); *Ashwander v. TVA,* 297 U.S. 288, 330 (1936).

[34] *Fuller v. Swan River Placer Mining Co.,* 12 Colo. 12, 17; 19 Pac. 836 (1898); *Wright v. Best,* 19 Cal.2d 368; 121 P.2d 702 (1942); *Sowards v. Meagher,* 37 Utah 212; 108 Pac. 1112 (1910); *Lindsey v. McClure,* 136 F.2d 65, 70 (CA 10, 1943).

[35] 300 U.S. 82, 96, *et seq.* (1937)

[36] Appendix a, 784 F.2d 921, 923, ftn. 2 (1986).

[37] *Philadelphia Co. v. Stimson,* 223 U.S. 605, 621 (1912).

of the power being exercised by the Secretary of the Interior to control all of the waters of the Salt River on the Fort Apache Indian Reservation and to commit those waters to the benefit of the Salt River Federal Reclamation Project. There is a total lack of authority to deprive Petitioner Tribe of its *Winters* Doctrine rights, so essential for Petitioner Tribe's present and future economic development. Absent specific authority conferred by Congress upon the Secretary of the Interior, there is no power pursuant to which the Secretary can confiscate and take from Petition Tribe its reserved rights.

On the subject of the power of the Secretary, over Indian property interests, the Court said this in its Shoshone opinion:

> The only way in which the Shoshones could lawfully have been deprived of the use and occupancy of [their lands] was through the exercise of the power of eminent domain . . . *The Government will not be deemed to have exercised that power merely because some unauthorized officer takes possession* [as here].[38]

In support of that conclusion, the Court decided the critical case of *United States v. Creek Nation.*[39] Broad powers reside in the Secretary of the Interior as the principal agent of the United States Trustee for Petitioner White Mountain Apache Tribe. Those broad powers may be exercised to administer the Tribe's property solely for Tribe's benefit.[40] *Shoshone* is authority for the proposition that the Secretary in managing Petitioner Tribe's property for Tribe's "betterment." The Secretary does not have the power

> '. . . to give the tribal lands to others, or to appropriate [as here] them to its own purposes without rendering, or assuming an obligation to render, just

---

[38] *Shoshone Tribe v. United States,* 299 U.S. 476, 482 (1937). (Emphasis supplied)

[39] 295 U.S. 103, 110 (1935).

[40] *See* Bogert, The Law Of Trusts And Trustees, Rev. 2d ed., 1978, § 543, p. 197. "Trustee's Duty Of Loyalty To Beneficiaries," and cited authorities; see, Vol. 2, Scott, Law Of Trusts, "Duties Of The Trustee," § 169, p. 1297; Vol. I, Restatement Of The Law Of Trusts Second, § 170, "Duty Of Loyalty."

compensation . . .; for that "would not be an act of guardianship, but an act of confiscation." '[41]

CONSUMMATION OF SECRETARIAL FRAUD IN STATE COURT W-1 PROCEEDINGS

There has been reviewed above the irreconcilable conflict between Petitioner White Mountain Apache Tribe and Respondent Hodel arising from their conflicting claims to the Salt River rights to the use of water. As a consequence, perhaps the most critical issue raised in Petitioner Tribe's complaint was whether, under the circumstances presented here, Petitioner Tribe's rights could be taken into the State Court W-1 Proceedings pursuant to 43 U.S.C. 666, the McCarran Amendment until the controversy between Petitioner Tribe and Respondent Secretary is resolved.[42]

State Court W-1 Proceedings: There was initiated on April 26, 1974 by the Salt River Water Users' Association, the agency that administers the Salt River Federal Reclamation Project for the Secretary of the Interior, an action now in the Superior Court of Maricopa County, State of Arizona, to adjudicate all of the rights to the use of water in the Salt River above Granite Reef Dam.[43] Throughout this Petition, that action is referred to as the Court W-1 Proceedings.

Petitioner Tribe's Unvarying Resistance to the Water Rights Claim Filed in the State Court W-1 Proceedings: There is attached to Petitioner Tribe's complaint a copy of the Water Rights Claim that was prepared by Respondent Hodel and subordinates for filing in the State Court Proceedings initiated by the Salt River Valley Water Users' Association, which administers the Secretarial Salt River Federal Reclamation Project for the Secretary of the Interior.[44] With reference to that Water Rights Claim of the United States as Trustee for the

---

[41] *Shoshone v. United States*, 299 U.S. 476, 497 (1937).

[42] Appendix E., Complaint, p. 46, Para. XCVI, *et seq.*

[43] *Ibid.*, p. 53, Para. CXIV.

[44] Appendix E, Complaint and the "Water Rights Claim" prepared reportedly on behalf of Petitioner Tribe is Appendix E of Petitioner Tribe's Complaint.

White Mountain Apache Tribe, there is set forth in the Complaint Petitioner Tribe's rejection of that Water Rights Claim.[45] There was likewise filed with the Complaint Petitioner Tribe's Resolution adopted by the Tribal Council, the governing body of the Tribe, on March 9, 1982.[46] In that Resolution, Petitioner Tribe, predicated upon an intensive investigation by Petitioner Tribe's experts in hydrology, soils, and geology, charged that the Water Rights Claim was flagrantly, false, grossly inadequate, and was prepared on the basis of information which the Tribe, if afforded the opportunity, would prove to be contrary to fact.

State Court W-1 Proceedings in its Infancy:[47] There was entered in the State Court W-1 Proceedings on August 5, 1985, an Order extending the time for filing claims in the Consolidated Proceedings W-1 Lower Gila River until January 20, 1987.[48] Petitioner Tribe filed with the Court of Appeals on November 27, 1985 a copy of the Order extending filing dates until January 20, 1987. Likewise filed with the Appellate Court, with its Emergency Motion, was a copy of the "Water Rights Claim," which was filed in the State Court W-1 Proceedings, purportedly on behalf of Petitioner Tribe on November 29, 1985.[49] There was likewise filed with the Court of Appeals for the Ninth Circuit Petitioner Tribe's objections to the Water Right Claim, supported by affidavits, establishing that the Water Rights Claim was drafted in a manner that would effectuate the Secretarial intentional denigration of Petitioner Tribe's Salt River rights for the benefit of the Salt River Federal Reclamation Project.[50] On November 29, 1985, the Court of Appeals for the Ninth Circuit denied Petitioner Tribe's Emergency Motion.[51]

---

[45] *Ibid.*, p. 58, para. CXXII.

[46] *Ibid.*, Attachment to Complaint Appendix F.

[47] Appendix F, Petitioner Tribe's Emergency Motion, filed November 27, 1985.

[48] State Court W-1 Proceedings Order, entered August 5, 1985, Appendix A of Appendix F.

[49] Appendix F. (*See* Appendix C, 784 F.2d 921 at p. 923).

[50] *Ibid., see* Affidavit of Thomas Michael Watson.

[51] Appendix G.

ARGUMENT

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORATI

COURT OF APPEALS' ERRONEOUS OPINION DEPARTS FROM ACCEPTED COURSE OF JUDICIAL PROCEEDINGS [52] AND ADVERSELY IMPACTS FEDERAL-STATE-TRIAL JURISDICTION

The Companion Case:[53] Issues in the companion case, referred to below are markedly contained in this action.[54] However, due to the Order of the District Court granting summary judgment, which is implemented by a permanent injunction against Petitioner Tribe involving genuine, highly controversial critical facts which pertain to the Fort Apache Indian Reservation. Stressed here, moreover, is the fact that the subject *res* in both cases is the Petitioner Tribe's reserved Salt River rights.

Appellate Court Departs Sharply from the Court's Opinions and Its Own Opinions: It is respectively urged that the Court of Appeals in the opinion presented here for review departs drastically from the principles of law repeatedly applied by the Court and indeed by the Court of Appeals itself. The Court of Appeals in its opinion correctly states that Petitioner Tribe does not name the United States of America as a party.[55] The Court of Appeals nevertheless without a scintilla of evidence before it declared:

> We construe such an action as one taken against the United States itself.[56]

In support of its conclusion that Petitioner Tribe was proceeding against the United States, the Court of Appeals in grave

---

[52] Rule 17, Jurisdiction on writ of certiorari.

[53] (604 F.Supp. 464 (U.S.D.C.D. Ariz. 1984); 784 F.2d 917 (CA 9, 1986).

[54] Appendix E. Complaint, p. 50, para. CV.

[55] Appendix C, *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 923 (CA 9, 1986).

[56] *Ibid.*

error, cites as its authority, the decision of *Dugan v. Rank* [57]. As can be seen from Tribe's complaint, extensively reviewed above,[58] Petitioner Tribe has charged in explicit terms that successive Secretaries of the Interior, including the incumbent Respondent Secretary Hodel and subordinates, (1) have consistently and illegally mismanaged the Fort Apache Indian Reservation for the purpose of enhancing the flow of the Salt River and its tributaries away from Petitioner Tribe's Reservation; (2) have intentionally and illegally destroyed Petitioner Tribe's grazing lands with the consequence that—although the runoff from the Salt River and its tributaries away from Petitioner Tribe's Reservation has been vastly accelerated for the benefit of the Salt River Federal Reclamation Project—Petitioner Tribe's Reservation is being literally washed away by sheet and gully erosion; and (3) Respondent Hodel and subordinates are presently illegally and intentionally overcutting Petitioner Tribe's forests to enhance Salt River flow away from the Reservation by upwards to 90 percent of growth in clear violation of the sustained-yield mandate imposed by Congress upon the Secretary of the Interior pursuant to 25 U.S.C. 466. This Court, in its *Bracker* decision [59] reviewed in explicit detail the Secretarial obligation properly to manage Petitioner Tribe's forests. That Respondent Donald P. Hodel and named subordinates are now and have been vastly illegally overcutting Petitioner Tribe's forest to the point of destruction is not subject to serious challenge, all as alleged in Petitioner Tribe's complaint.[60]

In sharp contrast to this case in which Petitioner Tribe has been summarily denied a moment in court to prove intentional, fraudulent mismanagement of its Reservation for the benefit of the Secretarial Federal Reclamation Project, there was approximately 200 days of trial in *Dugan v. Rank* in which it was

---

[57] 372 U.S. 609, 620 (1963).

[58] *Supra.*, at p. .

[59] *White Mountain Apache Tribe, et al., v. Bracker, et al.*, 448 U.W. 136, 145 (1980).

[60] Appendix E, Complaint, p. 37, para. LXXVII, *et seq.*, "Mismanagement of Forest Operations [by the Secretary of the Interior] to Increase Runoff."

unequivocally established by an abundance of evidence that Congress had fully authorized the construction of the Central Valley Reclamation Project, and had provided in great detail the methods pursuant to which the Central Valley Project was to be administered. Whereas here, as in *Scheuer v. Rhodes,* the only thing before the Court is Petitioner Tribe's complaint explicitly alleging a total lack of authority in Respondent Secretary Hodel and subordinates intentionally to mismanage Petitioner Tribe's Salt River rights, which stands admitted in the record. In the *Dugan* decision, relying on *Larson v. Domestic & Foreign Commerce Corporation.,*[61] the Court declared that:

> "The decree [prayed for in that case] would require the United States—contrary to the mandate of the Congress—to dispose of valuable irrigation water and deprive it of the full use and control of its Reclamation facilities." [62]

For the Court of Appeals to "construe" that, contrary to the facts that are before it, that the Tribe is proceeding against the United States of America is plain, serious, and it is respectfully urged, reversible error. As stated in *Scheuer* above,[63] the District Court cannot summarily dismiss Petitioner Tribe's complaint, as it pertains to Petitioner Tribe's Salt River rights pursuant to its Rule 54(b) Order.[64]

It is denied that a decree granting Petitioner Tribe the relief for which it prays in this proceeding would ". . . expend itself on the public treasury or domain, or interfere with the public administration." [65] Prohibiting Respondent Hodel and subordinates from illegally administering Petitioner Tribe's reserved rights in the Salt River for the benefit of the Salt River Federal Reclamation Project would not, indeed could not, interfere with agents of the United States acting within the scope of their authority.

---

[61] 337 U.S. 362 (1949).

[62] *Dugan v. Rank,* 372 U.S. 609, 621 (1963).

[63] *Supra.,* at p. 11 *et seq.*

[64] Appendix B.

[65] *Land v. Dollar,* 330 U.S. 731, 734 (1947).

Most assuredly the facts in *Dugan* establish that officials were acting within the mandate of Congress. Here, Respondent Hodel and subordinates are knowingly acting in violation of Petitioner Tribe's vested Salt River rights, which were severed by the District Court from pursuant to Rule 54(b) and dismissed.

In *Land v. Dollar,*[66] there has been extensively reviewed the principles which, it is respectfully urged, will govern here. In that case, the Court declared this principle:

> Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee, supra,* has been repeatedly approved . . . That rule is applicable here although we assume that the record title to the shares is in the Commission. In *United States v. Lee, supra,* record title to the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States . . . it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the complaint are proved.

Continuing, the Court declares in *Land v. Dollar:*

> But public officials may become tort-feasers by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relagated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.[67]

---

[66] 330 U.S. 731, 738 (1947).

[67] *Ibid.,* at p. 731, 737-738.

The analysis in *Land v. Dollar* of the Court's decision in *United States v. Lee,*[68] is most relevant. In Lee, the Plaintiff was afforded an apportunity to be heard—not so here. In that case, the Court held that:

> The assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their actions; that a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' [69]

The Court of Appeals Departs Radically from its Own Decisions: There has been referred to above the case of *Ickes v. Fox* [70] in which it was held that a proceeding against the Secretary of the Interior for unauthorized acts was not against the United States. That decision and numerous others are cited by the Court of Appeals in *Washington v. Udall,*[71] referring to the thorough study of the *Larson-Malone-Dugan* trilogy, and to the Ninth Circuit's decision in *Turner v. Kings River Conservation District* [72] and concludes that although the suit would appear to be one against the sovereign:

> '. . . the action is nonetheless maintainable against government officials under the two "exceptions" to the "general rule" if the acts of the officers were prohibited by statute or the Constitution.' [73]

Moreover in *Washington v. Udall,* the Court concluded within the exceptions of *Larson*—unauthorized acts—that there appeared to be "no reason pertaining to sovereign immunity why the District Court should not consider the State's complaint on its merits in order to determine whether the Secretary of the Interior or his subordinates have exceeded their statutory authority. . . " [74] respecting the issues there presented. In this

---

[68] 106 U.S. 196, 218-18 (1882).

[69] *Ibid.*

[70] 303 U.S. 82 (1937).

[71] 417 F.2d 1310, 1317-18, 1320 (CA 9, 1969).

[72] 300 F.2d 184, 189 (1966).

[73] *Ibid.,* at p. 190.

[74] *Washington v. Udall,* 417 F.2d, 1310 1319 (CA 9, 1969).

case, the Court of Appeals ignores those concepts and, irrespective of the explicit language of the complaint charging the officials as individuals with illegal conduct, the Court of Appeals declares that the action initiated will be construed as being against the United States and renders its opinion to that effect.

The Court of Appeals Totally Misconceives the Language of and the Interpretations Placed upon the McCarran Amendment, 43 U.S.C. 666: The factors giving rise to the opinion of the Court of Appeals in this case are difficult to comprehend. The Court of Appeals chronicles the resistance of Petitioner Tribe to the preparation of the "Water Rights Claim" by the Secretary of the Interior and likewise chronicles the objections of Petitioner Tribe to the filing of that Water Rights Claim in the State Court W-1 Proceedings.[75] At all times Petitioner Tribe has asserted to the United States Court of Appeals, to the District Court, and repeats and reiterates its position to the Court that 43 U.S.C. 666, the McCarran Amendment, has no application whatsoever to Petitioner Tribe's charges that Respondent Hodel and subordinates have illegally, fraudulently, and wholly without authority attempted to confiscate Petitioner Tribe's Salt River reserved rights for the benefit of the Salt River Federal Reclamation Project.[76] Genesis of the opinion of the Court of Appeals can only be explained by that Court's erroneous assertion that, although Petitioner Tribe did not name the United States, the action was nevertheless construed by the Court "... as one taken against the United States itself."[77] Predicated upon that misconception, the Court of Appeals, totally ignores the fact that Tribe's ongoing conflict is not with the United States but with Respondent Hodel individually, and does not come within the purview of the McCarran Amendment. Irrespective of that fact, the Appeals Court asserts that: "The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it."[78] Thereafter the Appellate Court, without referring to the fact that the conflict between

---

[75] Appendix C, *White Mountain Apache v. Hodel,* 784 F.2d 921, 922, *et seq.,* (CA 9, 1986).

[76] *Supra.,* at p. 13 *et seq.*

[77] Appendix C, at p. 923, ftn. 2. (Petitioner Tribe v. Hodel).

[78] *Ibid.,* at p. 924.

Petitioner Tribe and Respondent Hodel is not a "general adjudication proceedings" within the purview of the McCarran Amendment, declares that:

> "The State Court does have the authority to adjudicate tribal water rights in W-1. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. 666, the United States Supreme Court has said so . . . and we have said so . . . It is time that the Tribe accepts the proposition as true." [79]

With all due respect to the Court of Appeals, Petitioner Tribe makes this statement to this Court: The action initiated by Petitioner Tribe against Respondent Hodel and his subordinates—not the United States of America—does not remotely resemble, does not remotely parallel, and cannot properly be tortured into being a "general adjudication" suit within the purview of the McCarran Amendment. The Court in *Dugan v. Rank* established the parameters of the McCarran Amendment when it explicitly enunciated the concept that:

> It is sufficient to say that the provisions of the McCarran Amendment relied on by respondents and providing that the United States may be joined in suit 'for the adjudication of rights to the use of water of a river system or other source,' is not applicable here.[80]

From *Colorado River* this excerpt is taken, quoting from Senator McCarran, who sponsored the legislation:

> The legislation was not 'intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all the rights of various owners on a given stream.' [81]

In *Arizona v. San Carlos* [82] the Court explicitly rejects any departure from the concepts of *Colorado River,* belying any effort by the Court of Appeals to expand the objectives of the

---

[79] *Ibid.*

[80] *Dugan v. Rank,* at p. 372, U.S. 609, 618 (1963).

[81] *Colorado River Conservation District v. United States,* 424 U.S. 800, 808 (1976).

[82] 463 U.S. 545, 569 (1983).

McCarran Amendment to include actions by Indian Tribes involving charges of fraud against Respondent Hodel and his subordinates. Rationale of *Arizona v. San Carlos* is to preserve the independence of Indian Tribes from state jurisdiction in controversies of the nature of this case, by utilizing these terms:

> Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently . . . 'Because of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by a "historic immunity from state and local control" . . . and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interest of the National Government." '

Continuing, the Court then added:

> Nor should we be understood to retreat, from the general proposition, expressed in *Colorado River,* that federal courts, have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' [83]

Congress has not by the McCarran Amendment relegated the controversy between Petitioner Tribe and Respondent Hodel to the state courts. It is elemental that Petitioner Tribe is immune from suit.[84] As a consequence, it is impossible to perceive the predicate upon which the Court of Appeals has declared that the controversy between Petitioner Tribe and Respondent Hodel could be relegated to the state court. Nevertheless, that is the express declaration by the Appellate Court when it declares that the State Court W-1 Proceeding ". . . does have the authority to adjudicate . . ." the controversy between Petition Tribe and Respondent Hodel. Any question about that interpretation of the opinion of the Court of Appeals is removed by this declaration in the companion decision in which the Court of Appeals is removed by this declaration in

---

[83] *Ibid.*, 570, 571.

[84] *White Mountain Apache Tribe v. Shelly,* 107 Ariz. 4; 480 Pac. 2d 654 (1971).

the companion decision in which the Court of Appeals emphasizes that:

> We likewise reject the Tribe's contention that, because the water rights claim filed by the government on the Tribe's behalf is 'fraudulent,' the employees covered by the Tribal Court injunction were not acting within the scope of their duties as federal officers.

Thereafter the Court of Appeals—it is respectfully suggested—makes this erroneous statement:

> It is now beyond dispute that the state courts of Arizona have jurisdiction to adjudicate the water dispute at issue here [irrespective of the fraud factor which permeates all aspects of this litigation].[85]

Continuing in disregard of the fraud factor, the Court of Appeals states that, irrespective of Petitioner Tribe's contentions against Respondent Hodel and subordinates, those contentions do not divest "... the Arizona courts of jurisdiction ..." [86]

Petitioner Tribe's Action Charging Fraudulent Misconduct Is Not Within the Purview of the McCarran Amendment: Petitioner Tribe's immunity from suit in state court absent a specific mandate from Congress is total. That concept is underscored by the Court in *Santa Clara Pueblo:* [87]

> Indian Tribes have long been recognized as possessing the common-law immunity from suit ... 'Without Congressional authorization,' the 'Indian Nations are exempt from suit.'

Most importantly here, the Court added this statement:

> It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' [88]

---

[85] *United States v. White Mountain Apache Tribe, et al,* 784 F.2d 719, 720 (CA 9, 1986).

[86] *Ibid.*

[87] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).

[88] *Ibid.*

Continuing to examine the provisions of the Indian Civil Rights Act that was before it, the Court declared the principles that are governing:

> In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by sovereign immunity from suit.[89]

Continuing, the Court reviewed the governing principles, overlooked by the Court of Appeals, stressing that the Tribe's immunity from suit cannot be altered or changed:

> "... unless and until Congress makes clear its intension to permit the additional instrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize action for declaratory or injunctive relief against either the tribe or its officers." [90]

The Court is requested to apply to Petitioner Tribe the principles of *United States v. Sherwood* [91] and to declare that Petitioner Tribe's action against Respondent Hodel is not within the purview of the McCarran Amendment, stressing in that regard that waivers of immunity from suit are to be strictly construed.[92]

---

[89] *Ibid.*, at p. 59.
[90] *Ibid.*, at p. 72.
[91] 312 U.S. 586 (1930).
[92] *Ibid.*

CONCLUSION

As reviewed above, the State Court W-1 proceedings is in its infancy. Service of process is still ongoing in the colossal State Court W-1 and consolidated proceedings. Cognizance is taken in *Arizona v. San Carlos* that in 1983 service had been accomplished on 58,000 known water claimants, and filings are not required on the Lower Gila River until January 20, 1987. It is reasonably anticipated that the proceedings in question will continue for at least a half century.

Accordingly, Petitioner Tribe respectfully prays the Court to grant this Petition, affording Petitioner Tribe an opportunity to present to the Court the imperative need for Petitioner Tribe to be heard in the District Court respecting its controversy with Respondent Secretary Hodel which is not within the McCarran Amendment.

Respectfully submitted,

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for Petitioner
White Mountain Apache Tribe

Dated: September 2, 1986